

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS LEE HARRIS,

Defendant-Appellant.

UNPUBLISHED
November 7, 2013

No. 312348
Calhoun Circuit Court
LC No. 2011-003836-FH

Before: MURRAY, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

Following a plea of guilty, defendant was convicted of operating a methamphetamine lab. MCL 333.7401c(2)(f); MCL 333.7214(c)(ii). He was sentenced to a term of 84 to 240 months' imprisonment, with 106 days' credit. Defendant appeals his sentence by leave granted. We vacate defendant's sentence and remand for resentencing.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant was arrested during a roadside stop. Police officers found methamphetamine, methamphetamine ingredients, and two active methamphetamine "cooks" in his truck.¹ At his plea hearing, defendant pleaded guilty to operating a methamphetamine lab. During sentencing, offense variables ("OV") 1, MCL 77.31 (aggravated use of a weapon) and 2, MCL 77.32 (lethal potential of weapon used) were scored at 20 and 15 points, respectively. The trial court scored OVs 1 and 2 because it classified defendant's methamphetamine and portable methamphetamine labs as weapons, on the basis that the responding officers could have been harmed by the materials' potential to explode. On appeal, defendant challenges the scoring of these offense variables, and further argues that his due process rights were violated by the prosecution's alleged failure to abide by the terms of his plea agreement.

¹ A methamphetamine "cook" is a portable methamphetamine lab.

II. STANDARD OF REVIEW

When reviewing a trial court's scoring decision, the trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

"Unpreserved claims of constitutional error are reviewed for 'plain error.'" *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004) (citation omitted). Once the prosecution and defendant reach a plea agreement, "the prosecution is bound by the terms of the agreement." *People v Arriaga*, 199 Mich App 166, 168; 501 NW2d 200 (1993) (citation omitted). "Where the [plea] agreement is subsequently breached, a reviewing court has discretion to . . . order[] specific performance . . ." *People v Nixten*, 183 Mich App 95, 97; 454 NW2d 160 (1990).

III. OFFENSE VARIABLES

Defendant first asserts that the trial court should not have scored these variables because he never used his methamphetamine or either of his methamphetamine "cooks" as a weapon. The prosecution concedes error in this regard. We agree.

MCL 777.31(1)(b) provides that 20 points shall be assigned to OV 1 if "[t]he victim was subjected to or exposed to a . . . harmful chemical substance . . . or explosive device." MCL 777.32(1)(a) provides that 15 points shall be assessed to OV 2 if "[t]he offender possessed or used a . . . harmful chemical substance."

Our Supreme Court has determined that exposure to methamphetamine or a methamphetamine lab, without more, does not trigger the scoring of OVs 1 and 2. See *People v Crabtree*, 493 Mich 878; 821 NW2d 678 (2012). In its order, our Supreme Court reversed the portion of this Court's judgment in *People v Crabtree*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 2012 (Docket No. 302583), that assessed points for OVs 1 and 2 on the basis of possession of methamphetamine and operation of a methamphetamine lab. *Crabtree*, 493 Mich at 878. The Supreme Court ordered reversal in light of this Court's decision in *People v Ball*, 297 Mich App 121; 823 NW2d 150 (2012). *Crabtree*, 493 Mich at 878. In *Ball*, this Court concluded that mere exposure to heroin, without more, was insufficient to assess points to OV 1. 297 Mich App at 125-126. We concluded that although there may be cases where heroin could be classified as a weapon under the statute, the facts of that case did not result in such a classification because "defendant did not attack the victim with the heroin and, the heroin was not used as a weapon." *Id.* at 126.

We therefore find that the trial court improperly assessed points to OVs 1 and 2. There are no facts in the record supporting the notion that defendant used his methamphetamine or his portable methamphetamine labs as weapons. Because OV 1 is assessed points for the use of a weapon, MCL 777.31(1), and OV 2 is assessed points on the basis of the lethal nature of the weapon possessed or used, MCL 777.32(1), the trial court improperly assessed points to these offensive variables. Defendant neither possessed nor used any weapon, thus, OVs 1 and 2 should have been scored at zero. MCL 777.31(1)(f); MCL 777.32(1)(f). Because rescoring OVs

1 and 2 would alter the applicable recommended minimum sentencing range under the legislative guidelines, Michigan law requires that defendant be resentenced in conformity with the law. *People v Francisco*, 474 Mich 82, 89-92; 711 NW2d 44 (2006).

IV. DUE PROCESS

Although review of defendant's second argument is unnecessary because we are remanding for resentencing, we conclude that defendant's assertion that his due process rights were violated is meritless. Defendant argues that his right to due process of law was violated because the prosecution breached an alleged agreement to recommend a sentence of 51 months by instead recommending that defendant be sentenced to a term of imprisonment at the bottom of the guidelines. Defendant's argument is based on the prosecution agreeing to recommend a sentence at the bottom of the guidelines and then, in a separate response to the trial court's inquiry, stating his understanding that the minimum guideline sentence was 51 months.

Our review of the record leads us to conclude that the prosecution never agreed to recommend that defendant be sentenced to a term of 51 months' imprisonment. The record shows that the prosecution agreed to recommend, and in fact did recommend, that defendant be sentenced to a term of imprisonment at the bottom of the applicable sentencing guidelines. Defendant was subsequently sentenced to the absolute minimum term of imprisonment possible, although the guidelines were improperly calculated. The record contains no evidence that the prosecution breached the plea agreement and defendant's due process rights were not violated.

Defendant's sentence is vacated and the case remanded for resentencing. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra